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IN THE

SUPREME COURT OF THE UNITED STATES.

Term No.

WILLIAM C. FERGUSON,

Petitioner,

vs.

PHILADELPHIA TRANSPORTATION COMPANY,

Respondent.

ANNIE MAE FELLERS, Administratix of the Estate of Lonnie Moore, Deceased,

Petitioner,

vs.

PHILADELPHIA TRANSPORTATION COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

William C. Ferguson, and Annie Mae Fellers, Administratrix of the estate of Lonnie Moore, Deceased, by their attorneys, pray that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Third Circuit entered in the above entitled cases on June 4, 1953.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is unreported. (See Appendix, p. 98a.) The opinion of the United States Court of Appeals for the Third Circuit is not yet reported.

JURISDICTION.

The order of the Court of Appeals for the Third Circuit was entered on June 3, 1953. The jurisdiction of this Court is invoked under C. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. A., Section 1254.

QUESTION PRESENTED.

Is not the defendant, the Philadelphia Transportation Company, which operates an integrated transportation system including several railroads in the City of Philadelphia and adjacent areas, on which passengers may transfer from vehicles on one part of the system to trains on any other part of the system, and which has as one of its integral parts an electric rail line connecting Philadelphia, Pa., with Camden, New Jersey, which latter line carries between eight and ten million passengers a year, approximately ninety per cent of whom are connecting passengers transferring from this line to other railroad lines of the defendant, a common carrier by railroad engaging in interstate commerce within the meaning of the Federal Employers' Liability Act?

STATUTE INVOLVED.

Federal Employers' Liability Act, Act of April 22, 1908, C. 149, Sec. 1, 35 Stat. 65, as amended by Act of August 11, 1939, C. 685, §1, 53 Stat. 1404, 45 U. S. C. A., §51, et seq.

STATEMENT OF THE CASE.

The decedent, Lonnie Moore, was employed by the defendant at the time of his fatal accident on June 6, 1951, as a railroad track laborer in its Surface Plant Department. He

was assigned to the Southern Division of this department and accordingly worked in the central business district of Philadelphia and the southern area of the city. His area of work included defendant's Delaware River Bridge Railroad which connects Pennsylvania and New Jersey. Moore sustained fatal injuries in the course of his work when he was struck by one of defendant's trains.

The plaintiff, William C. Ferguson, was employed by the defendant, the Philadelphia Transportation Company, as a bus mechanic at the time of his accident, September 5, 1947. The principal part of his work consisted of making emergency repairs to equipment which became disabled while in operation. At the time of his accident, Ferguson was delivering a bus from one of the defendant's depots to replace a bus in actual route operation which had broken down. He was injured when the bus he was driving went out of control due to its defective condition.

The court below in affirming the District Court's dismissal of these actions decided that the defendant company is never subject to the Federal Employers' Liability Act. Therefore, for purposes of the present petition, it must be assumed that if it were to be decided by this Court that the defendant is subject to the Act, the duties of the two employees here involved could be found on remand to directly or closely and substantially affect railroad interstate commerce within the meaning of the Act.

There is no substantial dispute, if indeed there is any dispute at all, concerning any of the facts set forth hereinafter relating to the nature of the defendant's operations.

The Bridge Line is a railroad operated by the defendant under the terms of a lease agreement with the Delaware River Joint Commission which owns the line itself and the equipment operated thereon. This line extends from the Broadway Station in Camden, New Jersey, over the bridge and terminates at a point in the Broad Street rail line at 8th and Market Streets, Philadelphia, Pennsylvania. The operation of this line was first started in the

summer of 1941. The lease agreement was originally for a four year period and by its terms automatically renews itself for additional four year periods unless either party gives notice of intention to terminate. Further, under certain provisions of the lease which have been exercised, the Commission can elect to have the lease run until July 1, 1957. Thus this lease agreement was in effect on September 5, 1947, and is still in effect at the present time.

The Bridge operation has two stops in Camden, N. J., one at City Hall and one at Broadway and one stop in Philadelphia, Pa., at 8th and Market Streets. However, although it is not considered a part of the Bridge Line, the same trains which cross over the river from Camden after their stop at 8th and Market Streets go up to Broad Street and Girard Avenue on a branch of the Broad Street line in Philadelphia. From Broad and Girard the train returns to New Jersey by the same route. At Broad and Girard passengers from the Bridge train can transfer to trains on the Broad Street line, which also use the same station, platforms, etc., as the Bridge trains at that point. In addition passengers can transfer from the Broad Street line to the Bridge line at 8th and Market Streets. This latter refers to the Ridge Avenue spur of the Broad Street line which runs from Broad and Girard to 8th and Market Streets.

The entire transportation system of the defendant is operated as an integrated system. It is possible to get by means of transfers or interchanges from any part of the city to any other part of the city including the Bridge Line and Camden. This is done by paying the appropriate transfer charges for a two or three vehicle ride as the case may be. In 1947 it was possible to make a free transfer on a two vehicle ride. For purposes of transfer the type of vehicle was immaterial; that is, a passenger could transfer from buses to street car lines, from buses to rail lines, to the Bridge line, or any combination of such transfers. The defendant has no interchange privileges with any other transportation companies. The defendant has no lines other than

the Philadelphia-Camden Bridge Line which connect Pennsylvania with New Jersey.

In addition to the regular transfer charges, passengers on the Bridge Line must buy special Bridge tokens which are sold in Camden at the rate of two for five cents. All of this charge is turned over by the defendant to the Bridge Commission under the terms of its lease. These tokens bear on their face the "P. T. C." monogram. For accounting purposes the defendant figures separately the costs and revenue from its leased lines. These lines include the Bridge Line and the Broad Street line which the defendant leases from the City of Philadelphia. The Delaware River Bridge Commission owns the Bridge Line to a point slightly west of Franklin Square in Philadelphia. From Franklin Square west to 8th and Market Streets the line of the Bridge trains is owned by the City of Philadelphia and in addition the City owns the Ridge Avenue spur from 8th and Market Streets to Broad and Girard and the rest of the entire Broad Street Subway. The Broad Street Subway thus includes a portion of the Bridge Line from Franklin Square to 8th and Market Streets. The defendant pays a rental to the City which amounts to 3-5/9 cents for all passengers over 52,000,000 which the defendant carries on said lines or any portion thereof. Consequently maintenance of all right-of-way of the Bridge Line west of Franklin Square is charged to the Broad Street Subway operation rather than to the Bridge Line operation. This is so notwithstanding the fact that every Bridge train must necessarily travel on the portion of the line west of Franklin Square since the first stop in the city of Philadelphia is at 8th and Market Streets.

The Bridge line is considered by the defendant as an integral part of the Broad Street line. The trainmen who run the Bridge trains are first assigned to the Broad Street line, and then they can elect to operate Bridge trains or the Broad Street electric trains as they may choose. It is possible for such employees to interchange back and forth between the Bridge line and the Broad

Street Railroad. From the point of view of maintenance, the Bridge line is also operated as part of the Broad Street rail system; that is, the same maintenance people who work on the Broad Street line maintain the Bridge line. Rates of pay for all these employees are uniform for similar classification without regard to whether they work on the Bridge line or on any other part of defendant's system. All of defendant's employees, including of course Bridge line employees, belong to and are represented by the Transport Workers Union. All of these employees are covered by the same collective bargaining agreement. All the administrative work relating to the Bridge line including the making up of time tables is done by the general system employees of the defendant who do the same work for all other parts of the defendant's system. The supervisors of the Bridge line are the same supervisors who are in charge of the Broad Street train operation. Most of the repair and maintenance work of the Bridge line trains is done at the Fern Rock Shop which also handles the Broad Street Railroad equipment. A small amount of this work is done in the Camden Storage Yard. The hiring and training of all of the P. T. C. employees is done at one central place.

Both the Bridge line and the Broad Street line are of standard railroad gauge—4'8¼". The gauge of the Market Street line is 5'2¼". The defendant's street cars also operate on wide gauge tracks. The regular Broad Street line equipment is not used on the Bridge line since the Bridge line cars are all four motors while the Broad Street train cars are two motor cars. Bridge line trains are frequently interchanged on the Broad Street line.

Power for the operation of the Bridge line is furnished by two electric sub-stations; one in Camden and one in Philadelphia. The Camden station buys its power from the Public Service Gas and Electric Company of New Jersey, and the Philadelphia station buys its power from the Philadelphia Electric Company. The dividing line of the portion of the run served by each of these sub-stations is approximately at the center of the bridge.

The defendant operates 26 cars on the Bridge line which it leases, as set forth above, from the Bridge Commission. It operates 200 cars on the Broad Street line.

On September 1, 1947, the defendant had a total of 13,347 employees of which 58 were permanently assigned to the Bridge line. This number however includes only operating employees and does not take into account the supervisors, administrative and maintenance employees of the defendant who work on the Bridge line in addition to working in other parts of the defendant's system. The length of the Bridge line is 5.2 miles. In 1947, the Bridge line carried a total of 10,056,967 passengers. In 1950, the Bridge line carried 8,877,115 passengers. The gross revenue of the defendant in 1947 applicable to the Bridge line was $838,373 which latter sum included the amount yet to be paid over to the Delaware River Joint Commission.

The defendant has filed its tariffs for the Bridge line with the Public Utilities Commission of Pennsylvania. It has not filed with any similar body in New Jersey and it has filed no tariff with the Interstate Commerce Commission. However, there has never been any formal decision by the Interstate Commerce Commission on whether the defendant's Bridge line is subject to its jurisdiction.

Plaintiffs commenced these actions in the United States District Court for the Eastern District of Pennsylvania alleging that the actions arose under the Federal Employers' Liability Act (Appendix, pp. 3a, 6a). Following the commencement of the actions, the defendant filed answers (Appendix, pp. 8a, 10a) and also filed motions to dismiss (Appendix pp. 13a, 14a). In each case the motion to dismiss was based on the grounds that the Federal Employers' Liability Act was not applicable even to P.T.C.'s strictly railroad operations and that the Petitioners' exclusive remedy was under the Workmen's Compensation Act of Pennsylvania. Counsel have agreed that in the argument on the motions, the appeals, and the present petition, the only question that will be considered is the applicability of the Federal Employers' Liability Act to this system.

Following argument before the Honorable J. Cullen Ganey, Judge of the United States District Court for the Eastern District of Pennsylvania, an opinion was filed on December 30, 1952, granting defendant's motion to dismiss. Appeals were then taken to the United States Court of Appeals for the Third Circuit and argument heard thereon on May 21, 1953. In an opinion filed on June 4, 1953, that Court affirmed the judgment of the District Court. The present petition followed.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred in the following respect:

1. In holding that the defendant company is not at any time a common carrier by railroad within the purview of the Federal Employers' Liability Act.

REASONS URGED FOR GRANTING THE WRIT.

1. The importance of this question (see Question Presented, supra) becomes apparent when we consider the many situations and the many transportation companies with regard to whose operations it arises and consequent thousands of employees affected. To point out just a few instances, the question has already been litigated in one form or another with regard to transportation companies operating in Spokane, Washington, Kansas City, Missouri, Washington, D. C., and New York, New York, and extend-

ing from these cities across state lines into adjacent or nearby communities. This question arises virtually wherever there is a major metropolitan area straddling a state line. It is difficult to estimate the number of transportation employees who will be affected by a decision of this Court on whether they are entitled to the benefits of the Federal Employers' Liability Act, but unquestionably their number will run into the thousands or tens of thousands.

2. The court below decided this case in *conflict* with principles laid down by this Court in a number of its decisions. This Court has in a number of decisions laid down the guiding principles which control the decision on the present petition. The Court below refused to abide thereby.

In *Kansas City Western Railway Company v. McAdow*, 240 U. S. 51, 36 S. Ct. 252 (1916), this Court stated that though the defendant electric railway there involved, was essentially a street railway system and operated by the defendant jointly with the Metropolitan Street Railway Company of Kansas City, Missouri, it *nonetheless* was subject to the Federal Employers' Liability Act because it was an interstate operation. *Spokane & Inland Empire Railroad Company v. U. S.*, 241 U. S. 344, 36 S. Ct. 668 (1916), and *Spokane & Inland Empire Railroad Company v. Campbell*, 241 U. S. 497, 36 S. Ct. 683 (1916), both involved the same electric railway company operating between Spokane, Washington and Coeur D'Alene, Idaho. This Court in these two cases again held that an electric railway operating for a part of its run upon city streets like any other street railway was subject to both the Federal Safety Appliance Acts and the Federal Employers' Liability Act. The decision in *Washington Railway & Electric Company v. Scala*, 244 U. S. 630, 37 S. Ct. 654 (1917), made it clear that an operation using *any* type of electric rail cars can be subject to the Federal Employers' Liability Act. The equipment in that case consisted of ordinary open air *single trolley cars*.

The court below in arriving at its decision has adopted the distinction relied upon by the Court of Appeals for the District of Columbia in *Mangum v. Capital Traction Co.*, 39 F. 2d 286 (C. C. A. D. C. 1930), and in *Keffer v. Capital Transit Co.*, 183 F. 2d 808 (C. C. A. D. C. 1950), which was summed up by that Court in discussing the defendant company there involved in the following language (at page 288):

> "It is true that the company owns and operates a trackage extending about a mile and a half into Maryland which is continuous with its line within the District, and that it operates its cars as lessee over other extensions into the state of Maryland. It appears, however, that these lines extend into adjacent urban neighborhoods, which for purposes of transportation are practically part of the city, and are but extensions of the city street car systems."

These oblique opinions were never reviewed. Certiorari was never sought in the *Mangum* case nor in the *Keffer* case. It is submitted that these two cases (*Mangum* and *Keffer*) relied upon by the court below in reaching its decision are wrong. The decisions of this Court cited in the preceding paragraph demonstrate that the operation of the defendant involved in the present petition meets all the requirements for the application of the Federal Employers' Liability Act and that it is conducting as a common carrier a rail operation in interstate commerce.

3. This case is in direct conflict with the holding in *Kelly vs. Delaware River Bridge Commission*, 85 F. S. 15 in this very district.

4. This decision is in absolute irreconcilible conflict with the Court of Appeals for the Second Circuit in *Clemence vs. H. & M. R. R. Co.*, 11 F. 2nd 913.

BRIEF.

ARGUMENT.

1. The Federal Employers' Liability Act is applicable to the defendant's Delaware River Bridge Line operation.

The problem raised in the present appeals logically breaks down into two parts: application of the Federal Employers' Liability Act (45 U. S. C. A. §51) (hereinafter referred to as the Act) to the Delaware River Bridge Line Operation; and application of the Act to the intrastate portions of the defendant's system. We will take up first the application of the Act to the Bridge Line.

This railroad line has its termini at the Girard Avenue Station of the Broad Street line in Philadelphia, and the Broadway Station, in Camden. The defendant operates this railroad, using equipment which it leases from the Delaware River Joint Commission. It is an electrified railroad line and *runs on tracks of standard railroad gauge.* The equipment used consists of railroad cars powered by electric motors, coupled together and operated in trains. Unquestionably *the sole and exclusive purpose of this line is to provide interstate railroad transportation—to connect points in Pennsylvania with points in New Jersey.* That is to say, although the line has two stops in Camden and two stops in Philadelphia, it is apparent that it was not constructed and is not operated to connect points in the same state.

The cases under the Act have amply demonstrated that interurban electric lines connecting communities in differ-

ent states are "common carriers by railroad * * * engaging in commerce" within the statutory language. *Spokane & Inland Empire Railroad Company v. United States,* 241 U. S. 344, 36 S. Ct. 668 (1916), and *Spokane & Inland Empire Railroad Company v. Campbell,* 241 U. S. 497, 36 S. Ct. 683 (1916), both involved the same interurban electric line connecting Spokane, Washington and Coeur D'Alene, Idaho. This line ran for a portion of its run on city streets like an ordinary street car line, and for part of its run through the open country. It was held by this Court that this interurban, interstate line was subject to the F. E. L. A. (in the *Campbell* case). In the action brought by the United States it was held that this same line was governed by the requirements of the Federal Safety Appliance Act (45 U. S. C. A. Sec. 1-23) dealing with automatic couplers and prescribed grab-irons, notwithstanding the *exception* in that statute for cars *"used upon street railways".*

The Supreme Court in *Kansas City Western Railway Company v. McAdow,* 240 U. S. 51, 36 S. Ct. 252 (1916), stated that the interurban electric railway there involved connecting Leavenworth, Kansas, with Kansas City, Missouri, was subject to the F. E. L. A. Again it was held in *Washington Railway & Electric Company v. Scala,* 244 U. S. 630, 37 S. Ct. 654 (1917), that an interurban line extending from the District of Columbia to Cabin John just over the Maryland line was within the scope of the Act. In a distinction later held by this court to be meaningless in *U. S. vs. State of California,* 297 U. S. 175, the Court of Appeals for the District of Columbia in *Mangum v. Capital Traction Company,* 39 F. 2d 286 (C. A., D. C. 1930), distinguished the case before it from the *Scala* case, in that the railway involved in the latter case was incorporated as a "railway company" and had the power of eminent domain. *Nevertheless, in considering the essential nature of roads held to be within the F. E. L. A. we see that the defendant in the Scala case operated equipment which was nothing more or less than ordinary single street cars.*

The plaintiff's decedent in that case, as a matter of fact, was injured by being struck by a pole near the tracks as he walked along the running board of an open-air *trolley* car, collecting fares. The test, hence is not how incorporated, if at all, but what it does, *U. S. vs. California*, supra.

The Supreme Court in *United States v. Village of Hubbard, Ohio*, 266 U. S. 474, 45 S. Ct. 160 (1925), a decision upholding the right of the Interstate Commerce Commission to fix interurban rates for electric railways stated that "the words 'common carrier by railroad' * * * in the F. E. L. A. were applied to interurban electric railroads".

The United States Court of Appeals for the Second Circuit in *Clemence v. Hudson and Manhattan Railway Co.*, 11 F. 2d 913 (C. C. A. 2d, 1926), held that the defendant railroad and the employee there involved were within the coverage of the F. E. L. A. The defendant railroad in that case operates ordinary subway-type equipment through the tube connecting Manhattan with Jersey City and other nearby New Jersey communities. We do the same.

These cases discussed above, make it plain therefore that *any rail* transportation line or system, which is a common carrier, connecting points in two different states and the sole purpose of which is to provide transportation between those two different states is such a "common carrier by railroad" engaged in interstate commerce as is within the intendment of the F. E. L. A.

2. The defendant's entire transportation system is within the scope of the Federal Employers' Liability Act.

As the defendant has already agreed, its entire transportation system is a completely integrated system. Part is by single cars. Some by trains. It is possible to get from any part of this system by means of appropriate changes and transfers to any other part of the system, including the Delaware River Bridge Line. This line is obviously an

essential part of the entire integrated system. The defendant charges through rates which include transportation on various vehicles of the system wholly within the City of Philadelphia and transfer to the Delaware River Bridge Line. The mere description of these rates and these arrangements makes it obvious that these are interstate rates.

Defendant has admitted (Stier deposition, Appendix, p. 69a) that the overwhelming majority of passengers who ride the bridge line use on the same journey one or more vehicles operated by the defendant wholly within the City of Philadelphia. It stated (at page 7 of defendant's brief in the Court below):

> "From an analysis of interchange tickets and passenger fares paid on the Delaware River Bridge line defendant estimates that of the 1.07% for 1950, passenger distribution was as follows: direct journeys on Delaware River Bridge line involving no other vehicle, 11.3%; journeys involving the use of a second vehicle in Philadelphia, 60.2%; and journeys involving the use of more than one additional vehicle in Philadelphia, 28.5%."

It has frequently been held that a railroad operation purely intra-state in so far as its own trackage and equipment is concerned, but which connects with, and thus forms a part of, an interstate rail system is subject to the F. E. L. A. Thus in *Higginbotham v. Public Belt Railroad Commission, et al.*, 181 So. 65 (Ct. of App. of La., 1938), the decedent, a maintenance man on a bridge of an intra-state railroad, was killed in the performance of his duties. It was held that even though this railroad did not extend beyond the limits of the state, since it transported cars to and from other railroads which extended beyond the state, the decedent was covered by the F. E. L. A. To the same effect are *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App. 288, 168 S. W. 821 (1914); *Findley v. Coal & Coke Ry. Co.*, 76 W. Va. 747, 87 S. E. 198 (1915); and *Pritt v. West Virginia*

Northern R. Co., 51 S. E. 2d 105 (W. Va., 1948), cert. den. 336 U. S. 961, 69 S. Ct. 891 (1949).

Indeed in *Kach v. Monessen Southwestern Ry. Co.*, 151 F. 2d 400 (C. C. A. 3, 1945), the defendant was a wholly owned subsidiary of a steel company which was engaged in hauling cars in and around the parent plant and from the plant to several connecting railroads, and had a total trackage of 7½ miles. It was held to be a railroad coming under the Federal Employers' Liability Act by the Court of Appeals for the Third Circuit.

In conflict with its present holding, it then said at pages 401, 402:

> "The fact that the defendant railroad does not itself transport consignments of freight across state lines does not place it beyond the reach of the federal power under the commerce clause of the Constitution. Const., art. 1, sec. 8, cl. 3. *If it takes part with other carriers in the continuous movement of a consignment of freight which passes across a state line at some point in its journey between the place of origin and the place of destination it becomes a participant in interstate commerce and, therefore, subject to the power of Congress under the commerce clause of the Constitution.* The evidence, as we have seen, discloses that the defendant does exactly that. (Italics ours.)
>
> Although the defendant's operation is largely confined to the movement of cars into and out of the Steel Company's works it nonetheless does move for a portion of their trip carloads of freight which have been definitely committed to an interstate journey."

Terminal or port railroads providing connecting rail facilities in and around a port or terminal city, and entirely within one state, have been held to be within the rule stated in the preceding paragraphs. That is, a terminal railroad which connects with various interstate railroads and conducts a part of the through transportation of the inter-

state railroads by means of moving cars brought in by the interstate lines to various industries, docks and other carriers, is a common carrier by railroad engaged in interstate commerce and subject to the F. E. L. A . *United States v. State of California,* 297 U. S. 175, 56 S. Ct. 421 (1936); *Fort Street Union Depot Co. v. Hillen,* 119 F. 2d 307 (C. C. A. 6, 1941); *Newkirk v. Los Angeles Junction Rwy. Co.,* 21 Cal. 2d 308, 131 P. 2d 535 (1942).

The connecting intra-state railroad cases and the terminal railroad cases show that the P. T. C. system, connecting with, and in fact, *including within itself,* an interstate railroad line, i. e., the Delaware River Bridge Line, partakes of an interstate character. For thousands of passengers every day the P. T. C. furnishes a part of *through* transportation between points in New Jersey and points in Pennsylvania. Like the cases discussed just above, a single fare or rate is charged for a journey which includes travel on the Bridge Railroad Line and travel through the City of Philadelphia. Furthermore, and this fact should make the instant case even stronger than the terminal railroad cases, the defendant *itself* operates *all* the lines involved, the Bridge Railroad Line as well as the intra-city lines. These cases also make it clear that a transportation company can be engaged in interstate commerce although individual pieces of its equipment, or even all of its equipment, *never* leaves the state. Thus the P. T. C. is engaged in commerce in operating the Market Street Subway Elevated Line which directly connects with the Bridge Line even though the equipment on the Market Street Line never leaves the State of Pennsylvania. *Moreover, to the extent that bridge line equipment is used on the Broad Street Subway, defendant uses its interstate and intra-state railroad equipment interchangeably.*

Other cases directly in point with the present situation have arisen out of the operation of the Pennsylvania Railroad and the Reading Company suburban lines which connect outlying communities such as Paoli and New Hope with down-town Philadelphia. These lines are wholly intra-state.

The equipment used consists of electric self-powered cars generally similar in type to those used on defendant's subway lines. Unquestionably, the majority of passengers carried on these lines have as their ultimate destination, the business district of this city. For them, this transportation is not merely one link in an interstate journey as is the transportation furnished by the belt railroads and terminal railroads in the cases cited above. Nevertheless, in literally dozens of cases, the employees who operate these suburban lines have been held entitled to the benefits of the F. E. L. A. and this on the ground that these lines connect with interstate lines which run out of the railroads' down-town terminals and therefore form an essential part of interstate transportation. In so far as the Reading Company and the Pennsylvania Railroad are concerned jurisdiction in cases arising on these lines is no longer disputed. See for example *Dechant v. Reading Company*, C. A. No. 11526 in the District Court for the Eastern District of Pa., in which the defendant admits all of the allegations pertaining to the applicability of the Act. The defendant has sought to distinguish cases of this nature on the ground that "the operation of the suburban business by those two railroad companies is as part of a general railroad system, which of course brings them fully within the provisions of the F. E. L. A." (Page 22 of defendant's Brief in the court below.) The answer to this statement is that it is patent that all of the employees of an interstate railroad company are not simply by virtue of such employment covered by the Act. The language of the statute is too clear to admit of any doubt that employees engaged in purely intra-state pursuits whose duties do not "directly or closely and substantially affect such commerce" are *not* covered by the F. E. L. A.

A case closely parallel to the instant case is *Nelson v. Ironwood & B. Ry. & Light Co.*, 204 Mich. 347, 170 N. W. 45 (1918). There the defendant operated a *street railway* from Bessemer, Michigan to Gile, Wisconsin, which em-

ployed interurban and also city or local cars. The local cars crossed the state line between Michigan and Wisconsin. The plaintiff was a motorman on one of the local runs and his employment was limited to the City of Ironwood, Michigan. He commenced his run at a point in that city, took the car to the Wisconsin line and there turned it over to another crew which took it into Wisconsin. Plaintiff, who never left the State of Michigan, was injured while performing his duties in Ironwood. The Court found that the accident was covered by the F. E. L. A. It found that the plaintiff was engaged in interstate commerce, as the car on which the plaintiff worked was an instrumentality of such commerce. On the question whether street railways were intended to be covered by the F. E. L. A., the Court used the following language at page 47:

> "If any distinction whatever can be drawn between street railways and other railroads in any respect that can fairly be claimed to have a possible bearing on the question of the legislative intent of Congress as to the inclusion or exclusion of the former class of carriers, the difference, we are convinced, will be found to be merely one of degree and not of kind. No substantial reason suggests itself to us why the safe and unimpeded transportation of passengers from one state into another on a local street railway line operating solely over city streets, and the safety of the employees of such a railway, should not have been objects of solicitude on the part of Congress as well as the like beneficial results in connection with other forms of interstate railroad transportation. Nothing in the terms and provisions of the act indicates a design to exclude street railways. *Every provision of the act is as applicable to a purely street railway carrier whose lines extend from one state into another as to an interstate suburban electric railroad or an interstate steam railroad.*" (Emphasis ours.)

It is true that the subjecting of a system like the P. T. C. to the jurisdiction of the F. E. L. A. raises a constitutional problem; but it is submitted, this is a problem which has been resolved many times by this Court. To state the problem briefly, it is: May Congress in the course of regulating interstate commerce, regulate intra-state commerce which has a direct and important effect on said interstate commerce? The Supreme Court has unequivocally answered this question in the affirmative on a number of occasions.

The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999 (1871), sustained as a proper exercise of the commerce power, the recovery by the United States of a penalty imposed by Act of Congress upon vessels using navigable waters without first obtaining a Federal license. The Court here relied on the fact that the vessel carried goods destined for and coming from other states although the vessel itself never left the state of Michigan and "did not run in connection with, or in continuation of, any line of vessels or railways leading to other states". *United States v. Darby*, 312 U. S. 100, 61 S. Ct. 451 (1941), upheld the application of the Wage and Hour Act to the business of manufacturing lumber, clearly an operation taking place entirely in one state, for the reason that the finished product was destined for shipment in interstate commerce. Perhaps the clearest example of a case upholding regulations of intrastate activities under the commerce power is *Wickard v. Filburn*, 317 U. S. 111, 63 S. Ct. 82 (1942), where the application of quotas under the Federal Agricultural Adjustment Act and penalties for violation thereof was upheld when applied to a 23-acre wheat farm in Ohio. There was here no showing that any part of this crop was destined for interstate commerce, and in fact the quotas were expressly applied even to that portion of the crop which the farmer retained for consumption on his own farm. See also *The Shreveport Rate Cases*, 234 U. S. 342, 34 S. Ct. 833 (1914); *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 57 S. Ct. 615 (1937); *United States v. Wrightwood Dairy Company*, 315 U. S. 110, 62 S. Ct. 523 (1942).

This problem was very recently dealt with in a case similar in many of its features to the case before this Court. *United States, et al. v. Capital Transit Co., et al.*, 338 U. S. 286, 70 S. Ct. 115 (1949). This case defined the power of the Interstate Commerce Commission under the Motor Carrier Act (49 U. S. C. A. §301, et seq.) to fix through rates for passengers riding the Capital Transit Company's system in Washington, D. C., and transferring to other carriers going to nearby Virginia. At the time of the decision of the commission fixing these rates, the defendant had owned and operated one of the four bus lines connecting down-town Washington with northern Virginia. The commission set through rates for passengers riding the defendant's Washington vehicles and transferring to its Virginia-bound vehicles and at the same time ordered the defendant to set up the same rate structure with the other carriers operating into Virginia and not owned by it. Following this, the defendant disposed of its bus line going to Virginia and sought to have the order of the commission set aside. The Supreme Court held that the carrier was still subject to the Act *although now none of the defendant's vehicles left the District of Columbia, for the reason that "intra-state streetcar and bus transportation of passengers going to and from the Virginia establishments is an intricate part of an interstate movement."*

In the present case the governing statute of the F. E. L. A. applies by its terms to "every common carrier by railroad while engaging in commerce between any of the several states or territories", 45 U. S. C. A., Sec. 51. Considering each of the essential features of this definition, seriatim, **First** *there can be no doubt that the P. T. C. is a common carrier.* It holds itself out as being ready and willing to carry for hire any persons who may desire to use its services. 13 C. J. S. §530. **Second,** since it carries passengers between points in Pennsylvania and points in New Jersey, *it is by definition engaged in commerce between the several states.* Therefore, the only serious question as to the application

of the Act, if indeed it be a question, is **Third**, whether or not the P. T. C. is engaged in operating *"by railroad"*.

The term railroad was defined in the case of *In Re Columbia Ry. Gas & Electric Co.*, 24 F. 2d 828, 831 (D. C. E. D., S. C., 1928), where it was said:

> "The word 'railroad', in a strictly accurate sense, is a generic term, and certainly includes all kinds of railroads, whether street railways, horse car lines, cable car lines, electric trolley lines, suburban lines, interurban roads, or steam railroads engaged in general transportation."

In 74 C. J. S., p. 311, §1(a)(1), it is said:

> "A 'railroad' has been defined as a road specially laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars, drawn by steam or other motive power, to run upon; the term has no definite and precise signification, either as to the character of the road or the width, character, or amount of the structure, land or property included, and such matters must be determined from the connection in which the term is used."

The fact that railroad statutes in general, make little or no distinction between street railroads and general long lines railroads has been frequently shown by the cases. The Supreme Court of Pennsylvania in *Hestonville Mantua & Fairmount Passenger Railroad Co. v. City of Philadelphia*, 89 Pa. 210 (1879), held that a street railroad was governed by the General Railroad Law of Pennsylvania as regards exercise of rights granted under a franchise. *In Re Columbia Ry. Gas & Electric Co.*, 24 F. 2d 828, 831 (D. C. E. D., S. C., 1929), discussed above held a street railway to be "a railroad corporation" within the meaning of the Federal Bankruptcy Law.

In *Sparks v. Philadelphia & Camden Railroad Company*, 212 Pa. 105 (1905), a proposed underground railroad which

was to connect Philadelphia, Pennsylvania and Camden, New Jersey, the two cities involved in the present petition, passing under the Delaware River, was held by the Supreme Court of Pennsylvania to be a railroad properly incorporated under the Pennsylvania Railroad Incorporation Law. The Court specifically held that this proposed operation was not a street railway as contended by the plaintiff in that case. The Supreme Court per curiam approved the following language used in the opinion of the lower court at page 107:

> "The fact that tracks of a railroad or railway are laid in and wholly confined to the streets of a city does not, of itself, determine that they are the tracks of a street passenger railway company.

The Court in *San Francisco & S. M. Electric R. Co. vs. Scott*, 142 Cal. 272, 75 Pac. 575, 576 (1903) said:

> "The word 'railroad', as used in law, is broad enough to include street railroads, and many cases have arisen where the courts have held that the word does in its signification include such. Each case is to be determined upon its own facts, having in view the circumstances, the context, the presumed intention of the lawmakers, and the general policy of the state in regard to the particular matter."

In line with this view expressed in the case last cited above, we need but turn to some of the decided cases under the F. E. L. A. to see what manner of common carriers have been held to be railroads within the meaning of that law. The Supreme Court in *Washington Railway Gas & Electric Co. v. Scala*, 244 U. S. 630, 37 S. Ct. 654 (1917), found that a railroad connecting the District of Columbia with nearby suburban Maryland and operating on its line *ordinary street cars was a railroad within the Act.* It was sought to distinguish this case in *Mangum v. Capital Traction Co.*, 39 F. 2d 286 (C. A. D. C., 1930), where the Court

of Appeals brought out regarding the transportation system there before it which also extended into Maryland that "it appears however that these lines extend in adjacent neighborhoods which for purposes of transportation are practically part of the city, and are but extensions of the city street car systems". The realistic truth of this statement lends absolutely no force to it as a legal argument on the instant question. Certainly every word of this statement could equally be applied to the line before the Supreme Court in the *Scala* case.

Likewise, the defendant in *Clemence v. Hudson & Manhattan Rwy. Co.*, 11 F. 2d 913 (C. C. A. 2d, 1926), operated and still operates equipment which is nothing more or less than ordinary subway cars but which happen to cross a state line. It was held to be a common carrier by railroad. Again in *Spokane & Inland Empire Railroad Co. v. Campbell*, 241 U. S. 497, 36 S. Ct. 683 (1916), the electric self-powered cars there held to be within the ambit of the F. E. L. A. differed in no significant respect from the equipment operated by the defendant in its subways and on the bridge line.

The fact that the total trackage of a railroad is short does not prevent its being a railroad within the meaning of the F. E. L. A. and other federal statutes applicable to railroads. *United States v. Brooklyn Eastern District Terminal*, 249 U. S. 296, 39 S. Ct. 283, 285 (1919). As was said in *United States v. Sioux City Stock Yards Co.*, 162 F. 556, 559 (1908), a case involving the so-called "28 hour law" applicable to railroads:

> "The fact that it operates its road only within a distance of 1½ miles, the distance from the terminal tracks of the other railroads at Sioux City, to its yards, and the different chutes or places of loading and unloading cars, is wholly immaterial. *Its character as a railroad company is established when it does the business of a railroad, and in a manner in which a railroad is usually operated, and not from the length of its road or tracks.*" (Emphasis ours.)

Further, the mere fact that a carrier transports only passengers and hauls no freight was held insufficient to prevent the application of the F. E. L. A. Washington Ry. Co. v. Downey, 40 App. D. C. 147 (1913), error dismissed 236 U. S. 190, 35 S. Ct. 406 (1915).

Looking to the broad and beneficent purposes of this statute, it is clear that the Congressional intent was to extend its benefits to employees working in railroad type operations and engaged in interstate commerce. Defendant's employees, such as those involved in the instant two cases are just as clearly intended to have the protection of the Federal Act as those employees in all of the cases discussed above. It is significant that under the Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, et seq., the Congress made all railroad companies liable for the negligence of any employee or "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Thus, the accident need not happen on the railroad; it may happen on a boat, wharf or dock, or by reason of machinery or equipment other than typical railroad rolling stock. This shows the broad, inclusive interpretation intended by Congress within which the Federal Employers' Liability Act was to apply.

Defendant has urged that the Court consider a number of factors as bearing on whether it is within or without the scope of the F. E. L. A. These include miles of private right-of-way, power of eminent domain and charter of incorporation. The significant thing about all of these factors is that they relate to purely technical considerations. No one of them have any significant bearing on the true nature of the transportation system involved. For example, the defendant informs us that the bridge line is not operated on private right-of-way. Perhaps by this it is meant that the defendant itself does not own the right-of-way used by the bridge line, for it is difficult indeed to see how any right-of-way could be more private than that of the Philadelphia-Camden Bridge Line.

As was said in the case of *United States v. Brooklyn Eastern District Terminal*, 249 U. S. 296, 39 S. Ct. 283, 285 (1919), a case dealing with the application of the Hours of Service Act:

> "We need not undertake a definition of the term 'common carrier' for all purposes. *Nor are we concerned with questions of corporate power* or of duties of shippers, which frequently compel nice distinctions between public and private carriers. We have merely to determine whether Congress, in declaring the Hours of Service Act applicable 'to any common carrier or carriers, their officers, agents, and employers, engaged in the transportation of passengers or property by railroad,' made its prohibitions applicable to the Terminal and its employes engaged in the operations here involved. The answer to that question does not depend upon whether its charter declares it to be a common carrier, nor upon whether the state of incorporation considers it such; *but upon what it does.*" (Emphasis ours.) In *Ex parte Collett*, 337 U. S. 55, 59, this Court held that the word "any" is all inclusive.

Further authority for the proposition that the nature of the charter of incorporation is of no significance in determining whether a particular operation is subject to the F. E. L. A. is found in *United States v. State of California*, 297 U. S. 175, 181, 56 S. Ct. 421, 422 (1936), where the terminal railroad operated by the State of California was held subject to the Act although assuredly the State of California is *not* incorporated as a railroad. This Court there said:

> *"Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes but upon what it does."* (Emphasis ours.) This renders the distinction relied on in the *Mangum* case, supra, followed by the Court below as untenable.

In addition, the defendant has pressed upon the Court the fact that statistically the bridge line operation amounts to something slightly better than 1% of its entire vast operation. Be that as it may, it is first important to note that according to defendant's figures in 1947, defendant carried a total of *10,056,967* passengers on its Delaware River Bridge line and during that same year the total gross revenue of the bridge line amounted to $838,373. An operation of this extent cannot be lightly brushed aside as being de minimis merely because it represents a small proportion of the defendant's total transportation operations. Viewed from any standpoint, it is obvious that the defendant is in the interstate railroad transportation business in a *substantial* way. Secondly, and equally important, none of the cases which have been found have given any weight to a test of this nature, i. e., the percentage of interstate as opposed to the percentage of intra-state business. Cf. *Wickard v. Filburn*, 317 U. S. 111, 63 S. Ct. 82 (1942). What defendant is plainly doing is seeking to press upon this Court for its acceptance, a *new* test for determining the applicability of the Federal Employers' Liability Act and one which has never been recognized by any Court. The really significant factors are that defendant operates a wholly integrated system of transportation, that this system provides service across a state line as well as service wholly within one state and that this system by its essential nature is a railroad.

The District Court in its opinion stated that the Interstate Commerce Commission had "affirmatively asserted it has no jurisdiction of the fares charged by the defendant". This statement was apparently based on oral testimony in the deposition of defendant's vice-president Stier. (Appendix, pages 89a, 90a.) It is important to note however, that that same testimony refers only to an alleged exchange of letters between the City Solicitor of Philadelphia and the Commission, and that there has *never* been an adjudication by the I. C. C. or any other tribunal of whether any of defendant's rates are subject to federal regulation.

CONCLUSION.

The respondent is the Philadelphia Transportation Company, locally known as the P. T. C. It is an integrated transportation system with service provided by four railroad lines, *three of which are confluent,* trolley cars, trackless trolleys and buses. Interchange and connecting privileges are permissible on all—some by free passes, others by exchanges costing two or three cents above the regular fare. The service runs from Delaware, Montgomery and Bucks Counties into Philadelphia County, all in Pennsylvania, and across the Delaware River into New Jersey to offer transportation to the Jersey side of the great Delaware Valley, recently become the highly publicized greatest industrial center in the world.

The four electric railroads are: Delaware River Bridge Line, Broad Street Line, Market Street Line, and the Locust Street Line. All meet at separate points along Market Street in Philadelphia. All run as trains, not single cars.

The defendant P. T. C.'s transportation system is subject to the provisions of the F. E. L. A. A part of this system, namely, the so-called Delaware River Bridge line, is actually engaged in carrying passengers between points in two different states. Moreover, the entire system is a completely integrated one, having a rate structure of through fares covering transportation over a system which operates in Pennsylvania and New Jersey. This common carrier is, by its essential nature, a railroad such as was within the Congressional intent as set forth in the Federal Employers' Liability Act.

If the P. T. C. was ever a "street railway" in the sense that it might be excepted from the coverage of the F. E. L. A., its directors and stockholders voluntarily and intentionally altered that status when the company accepted control and operation of the Delaware River Bridge interstate railroad

operations and its concomitant benefits. It should therefore be estopped from denying the accompany responsibilities and duties owed to its employees when it became an interstate railroad.

A writ of certiorari should be granted and the holding of the court below should be reversed.

Respectfully submitted,

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OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 113 F. Supp. 275 (App. 98a). The opinion of the United States Court of Appeals for the Third Circuit is reported in 205 F. 2d 520 (App. 106, 107).

JURISDICTION.

The judgments of the United States Court of Appeals for the Third Circuit were entered on June 4, 1953 (App. 107, 108). The Petition for a Writ of Certiorari was filed August 26, 1953. The jurisdiction of this Court is invoked under the Act of June 25, 1948, C. 646, 62 Stat. 928 (28 U. S. C. A., Sec. 1254).

QUESTION PRESENTED.

Whether respondent is exempt from the provisions of the Federal Employers' Liability Act as amended, because (a) it is not a "common carrier by railroad", and (b) it is not engaged in "commerce between any of the several states".

STATUTE INVOLVED.

Federal Employers' Liability Act, Act of April 22, 1908, 35 Stat. 65 as amended by Act of August 11, 1939, 53 Stat. 1404 (45 U. S. C. A., Secs. 51, et seq.).

STATEMENT.

Respondent, Philadelphia Transportation Company, is a street railway company, resulting from an agreement of consolidation and merger pursuant to law of some sixty-five different street railway and motor power companies which had previously been chartered at various times under the law of Pennsylvania.

Respondent operates a system of street railway and bus lines in the City of Philadelphia, which in 1947 contained a total track mileage of 629 miles, of which the Delaware River Bridge line represents 5.2 miles or ¾ths of 1%; and the total route miles of the system in 1947 were 1,259 of which the Delaware River Bridge line represented 4/10ths of 1% (App. 80a, 85a).

As of December 31, 1947, respondent operated 556.712 miles of track in route service, excluding carhouses, sidings and carbarns. 29.391 miles of track were installed on private right-of-way (none of which includes Delaware River Bridge line), but since all private right-of-way was double track the actual miles of private right-of-way operated were one half of that or 14.695 miles. In addition, 26.340 miles of route of trackless trolley were operated over the streets of Philadelphia and 601.890 miles of bus route. Comparable

figures for December 31, 1950, show 523.279 miles of track in route service; 29.053 double-tracked privately owned right-of-way or actual miles of private right-of-way 14.526 miles (again, none of which included the Delaware River Bridge line); 47.607 miles of route of trackless trolleys; and 651.390 bus route miles. Street mileage only is counted irrespective of how many routes operate over that street, and that with regard to the ownership of private right-of-way (14.+ miles) respondent, in certain cases, does not have title in fee but merely a right-of-way grant which dedicates the use of the land to respondent so long as it maintains passenger service over it (App. 88a, 89a, 91a). Of the track mileage over which the respondent operates, is the Delaware River Bridge high speed line. This line is 5.2 miles long, of which approximately 1.3 miles lies outside the State of Pennsylvania and represents the distance from the center of the Delaware River Bridge to the Camden terminal at the Broadway Station in Camden. This is the only operation which respondent conducts outside the State of Pennsylvania and, as noted above, represents a fraction of 1% of its entire operation (App. 79a, 80a, 87a).

Certain other comparisons are pertinent. In 1947, respondent carried a total of 1,078,136,479 passengers, and of this total 10,056,967 were passengers on the Delaware River Bridge line; this is actually 93/100ths of 1%. In 1950, the respective figures and percentages were: total passengers 827,620,634, Bridge line passengers 8,877,115, or 1.07%; and for the first six months of 1951: total passengers 406,087,132, Bridge line passengers 4,180,066, or 1.03% (App. 68a).

In 1947 gross passenger revenue for the entire system was $61,428,830, of which the Delaware River Bridge revenue was $838,373, or 1.36% of the total. The Delaware River Bridge revenue included not only the base fare, but the 2½¢ Bridge toll charge collected for the account of the Delaware River Bridge Joint Commission, and of course that amount represented no revenue to respondent (App. 84a).

In September, 1947, respondent had a total of 13,347 employees; of these 58 were assigned to the Delaware River Bridge line, with some few others from time to time for part-time work. Mr. Stier, respondent's Operating Vice President, stated as a rough estimate that if the Delaware River Bridge line were to be self-sufficient, there would have to be an increase of approximtaely 35% in employees assigned to this line, or 20 additional employees. From the above figures, it is apparent that the employees regularly assigned to the Bridge line were .004% of the total (App. 69a, 70a).

From an analysis of interchange tickets and passenger fares paid on the Delaware River Bridge line, respondent estimates that of the 1.07% for 1950, passenger distribution was as follows: direct journeys on Delaware River Bridge line involving no other vehicle 11.3%; journeys involving the use of a second vehicle in Philadelphia 60.2%; and journeys involving the use of more than one additional vehicle in Philadelphia 28.5% (App. 69a).

The tariffs of the respondent are filed with the Public Utility Commission of Pennsylvania. No tariffs are filed in New Jersey or with the Interstate Commerce Commission; and recently in connection with a complaint filed by the City Solicitor of Philadelphia with the Interstate Commerce Commission, the Interstate Commerce Commission replied that it had no jurisdiction of the fares charged by the respondent (App. 66a, 67a, 89a, 90a, 91a). Respondent's tariffs as of September 1, 1947, and August 23, 1951, have been made a part of the Record below, as Defendant's Exhibits 1 and 2 (App. 86a, 87a).

Both the Broad Street subway and the Delaware River Bridge line are operated under lease, the former from the City of Philadelphia and the latter from the Delaware River Bridge Joint Commission (App. 52a, 58a). A single system of tickets and interchange privileges exists for the entire system, including the Delaware River Bridge, and under the lease agreement with the Delaware River Bridge Joint Com-

mission respondent collects a Bridge toll charge (2 tokens for 5¢) from passengers using the Bridge line, and this is turned over in its entirety to the Delaware River Bridge Joint Commission (App. 55a, 56a, 60a, 87a).

In the PTC cost accounting system charges are segregated, first, between surface and high-speed lines, and second, between company owned and leased lines such as the Delaware River Bridge and the Broad Street subway. A separate system is maintained for the Delaware River Bridge Joint Commission (App. 62a).

The track gauge of the Broad Street subway and the Delaware River Bridge is standard gauge (4′ 8½″). The entire balance of the rail system of respondent is wide gauge (5′ 2¼″). The reason the standard gauge was used in the Broad Street subway was that the City originally designed it in this fashion because of the belief, at that time, that the Pennsylvania Railroad's Jersey trains would also use it (App. 56a, 57a).

The total equipment used by the respondent, of cars, buses, trackless trolleys, etc., is 3,407. Of this total Broad Street subway has 200 cars, and the Delaware River Bridge line 26 (which are owned by the Delaware River Bridge Joint Commission and leased to respondent). The relative percentage of Delaware River Bridge line cars to all of respondent's equipment is a little less than ½ of 1% (App. 75a).

There can be no interchange of equipment generally for use on the Delaware River Bridge or the rest of the respondent's system, except that the 26 Delaware River Bridge line cars can be, and have on occasion been, used on the Ridge Avenue spur of the Broad Street subway, but this has always been with the express consent and permission of the Delaware River Bridge Joint Commission. The explanation for this is that although the Broad Street subway cars appear similar to the Bridge line, the former are two-motored and because of the grades involved on the Bridge

cannot be used there. The Commission's cars are four-motored (App. 75a).

Both in 1947 and at the present time there is only one bus line (Route D) which offers direct interchange with the Delaware River Bridge line. This route operates on Sansom and Locust Streets, and a "walking" transfer privilege exists to the 8th Street subway (App. 77a, 78a). Respondent has no interchange privileges with anyone on the Camden side (App. 79a, 80a). Respondent does have a joint tariff with the Philadelphia Suburban Transportation Company (all of whose lines are within Pennsylvania) over two routes of the latter which connect with the Market Street subway elevated, but respondent has no interest, financial or otherwise, and no operational control over the Philadelphia Suburban Transportation Company (App. 78a). There are no trolleys or buses to Camden operated by respondent other than the Bridge line, and respondent has no connection with either the Palmyra Ferry or Bridge, the Riverside or Riverton bridge ferry systems, or the ferry systems in Philadelphia. It is, of course, true that respondent's street car lines operate down to Front Street near the Philadelphia ferries, but there are no pass or interchange privileges. Respondent has neither joint tariffs nor pass or interchange privileges with the Pennsylvania, Reading, or Baltimore and Ohio railroads. There is a single system of tickets and interchange privileges existing for the whole integrated system which includes the Delaware River Bridge line (App. 55a, 79a, 80a).

No freight or mail is carried on any part of the system. Evidence shows that at one time respondent did have a mail contract for transportation of mail from the Broad and Olney Terminal of the Broad Street subway to Willow Grove, and Doylestown. This contract was terminated on April 14, 1946, and no mail has been carried since then. Neither mail nor freight has ever been carried on the Delaware River Bridge line (App. 80a).

The electrical power for the Delaware River Bridge line

is furnished from two substations, one in Philadelphia and one in Camden. Power for the Camden substation is purchased from the Public Service Gas and Electric Company of New Jersey; for the Philadelphia substation, from the Philadelphia Electric Company. There is a dividing in the middle of the bridge on the state line, the Jersey side is fed from the Camden substation and the Philadelphia side from the Philadelphia substation. These two substations are each independent self-contained units which furnish all of the power for the Delaware River Bridge line and nothing else (App. 71a, 72a, 73a).

The cleaning and repair work on the Delaware River Bridge line equipment is done mainly in the Fern Rock shop of the Broad Street subway, which also handles all of that type of work for the Broad Street subway. A small amount of cleaning and repair work is done at the Camden storage yard (App. 74a).

FERGUSON, injured in 1947, was employed by the respondent as a mechanic or serviceman and his main duties involved the servicing of buses in the garage and on the street and, occasionally, the servicing of a trackless trolley (App. 25a, 26a).

FELLERS' decedent, **MOORE**, killed in 1950, was employed by respondent as a track laborer to break concrete, load materials, carry rails, ties, etc. He, on occasion, had been assigned to construction and maintenance work on the Delaware River Bridge line, but was not so engaged at the time of his accident (App. 93a, 94a, 95a).

After full use of discovery which developed the foregoing facts, respondent filed Motions to Dismiss which were sustained by the District Court. On appeal the Court of Appeals for the Third Circuit affirmed in a per curiam opinion. From the judgments entered in accordance with that opinion, the present Petition for Certiorari has been filed.

ARGUMENT.

1.

PTC is not a common carrier by railroad engaged in Interstate Commerce.

The Act of April 22, 1908, 35 Stat. 65, as here pertinent, provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow * * *; and, if none, then to the next of kin dependent upon such employee * * *" (45 U. S. C. A., Sec. 51).

The closest analogous case to the present is that of *Mangum v. Capital Traction Co.*, 59 App. D. C. 241, 39 F. 2d 286 (D. C. Cir., 1930). In that case the plaintiff, a motorman-employee of defendant company, was injured while operating a street car in the District of Columbia, from the Navy Yard to 14th Street and Colorado Avenue, this run being entirely within the District of Columbia. Plaintiff contended that his action fell under the FELA, since the traction company at the time of the accident was a "common carrier by railroad" within the intent and meaning of that Act. The record disclosed that the defendant and its successor companies operated a street railway system within the District of Columbia and in addition owned and operated a trackage extending about a mile and a half into

Maryland, and also as lessee over other extensions into Maryland. The court stated, inter alia, as follows:

> "We think that street railways are not included within the clasisfication of 'common carriers by railroad' as used in the Federal Employers' Liability Act of April 22, 1908. This conclusion follows from the natural import of the terms therein employed, from the history of the legislation, and from various expressions to be found in Supreme Court opinions. See Employers' Liability Cases, 207 U. S. 463, 28 S. Ct. 141, 52 L. Ed. 297; Omaha & Council Bluffs Street Railway Co. v. Interstate Commerce Commission, 230 U. S. 324, 33 S. Ct. 890, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385; Washington Railway & Electric Co. v. Scala, 244 U. S. 630, 37 S. Ct. 654, 61 L. Ed. 1360.
>
> "It is our opinion also that the Capital Traction Company was a street railway and not a railroad or common carrier by railroad at the times in question. In Washington Railway & Electric Co. v. Scala, 244 U. S. 630, 37 S. Ct. 654, 655, 61 L. Ed. 1360 (affirming 45 App. D. C. 484), the Supreme Court held the appellant company to be a railway company and not a street railway, and gave the reasons for that definition in the following words: 'With these acts and the evidence and admissions shown in the record before us, it is clear that the defendant was incorporated as, and at the time of the accident complained of was, a railway company, not a street railway company; that it had full powers of eminent domain; that at the time of the accident complained of it owned and operated a line of electric railway extending from a terminus within the District of Columbia to a terminus at Cabin John creek, in the state of Maryland, a large part of the line being constructed on a private right of way, and that it was at that time a common carrier of passengers for hire between its termini.'

"The distinction between street railways and commercial railroads is thus stated in 25 R. C. L., p. 1115: 'A street railway in its inception is a purely urban institution. It is intended to facilitate travel in and about the city from one part of the municipality to another, and thus relieve the sidewalk of foot passengers and the roadway of vehicles. It is thus an aid to the exercise of the easement of passage; strictly a city conveyance, for the use of the city, by people living or stopping therein, and fully under the control of the municipal authorities, who have been endowed with ample power for that purpose. Speaking generally, then, a street railway is local, derives its business from the streets along which it is operated, and is in aid of the local travel upon those streets; while a commercial railway usually derives its business, either directly or indirectly, through connecting roads, from a large area of territory, and not from the travel on the streets of those cities, either terminal or way stations, along which they happen to be constructed and operated.'"

In that case plaintiff's counsel relied heavily upon the decision of the United States Supreme Court in *Washington Railway & Electric Company v. Scala,* supra. The same distinctions between that case and the *Mangum* case are apparent here. The court in the *Mangum* case stated as follows:

"The plaintiff relies upon the Washington Railway & Electric Company v. Scala, above cited, as authority for his contention that the defendant is a railroad in the sense of the Employers' Liability Acts. In that case, however, the railway was chartered, not as a street railway system, but as an electric trolley suburban and interurban railway company, and extended from the western edge of the city through small suburbs and country, with power to extend its line westwardly from Thirty-Sixth and Prospect streets, this city, to Cabin

John creek in Maryland. It operated its cars between these termini. It possessed full powers of eminent domain, and its line was built largely on a private right of way between its termini. The case cited differs materially from that now before us."

In *Keffer v. Capital Transit Co., Inc.*, 87 App. D. C. 13, 183 F. 2d 808 (Ct. of App., D. C., 1950), the holding of the *Mangum* case was specifically approved and followed to the effect that a street railway is not a "common carrier by railroad" within the meaning and intent of the FELA.

In the light of the *Scala* and *Mangum* decisions and the factors therein considered, let us examine the nature and character of this respondent, together with its activities.

First, as to charter of incorporation. The Philadelphia Transportation Company came into being January 1, 1940, as a result of Letters Patent issued by the Governor of Pennsylvania. These Letters Patent were recorded in the Office for Recording of Deeds in and for Philadelphia County in Charter Book No. 132, Page 152, on January 4, 1940. The Letters Patent resulted from an agreement of consolidation and merger, pursuant to law, of some sixty-five different street railway and motor power companies which had been previously chartered at various times under the laws of Pennsylvania. This Court can take judicial notice of the fact that the agreement of consolidation and merger was confirmed by the District Court pursuant to reorganization proceedings of the Philadelphia Rapid Transit Company System which were had in the Eastern District of Pennsylvania under Cause No. 18204.

Second, the power of eminent domain. Street railways in Pennsylvania were not originally endowed with the

power of eminent domain until 1907 when by appropriate Act of Assembly they were granted this power subject, however, to a number of provisos including:

> "That all street railway companies that shall avail themselves of the right of eminent domain shall be common carriers of express matter, farm produce, garden-truck, milk, merchandise and other light freight and property." (Act of June 1, 1907, P. L. 368, Sec. 1 [67 P. S., Sec. 1221].)

The Courts of Pennsylvania have construed this Act to be permissive, not mandatory, stating that a street railway company may or may not avail itself of the privilege, as it deems best:

> *Lehigh Valley Transit Co. v. Public Service Commission*, 78 Pa. Super. Ct. 105, 107 (1921).

Respondent has never availed itself of the privilege granted under the Act and has never carried freight on any part of its system. Until April 14, 1946, PTC had a mail contract for transportation of mail from the Broad and Olney terminal of the Broad Street subway to Willow Grove and Doylestown; however, that contract was terminated on April 14, 1946, and no mail has been carried anywhere in the system since that date. In connection with transportation of mail, the Court's attention is directed to the Act of April 22, 1909, P. L. 114, Sec. 1 (67 P. S. 1248), which states that all street railways chartered as common carriers under the Pennsylvania laws and constitution are *required* upon demand by the United States Government to carry mails at a price mutually agreed upon or, if no agreement, to be fixed by the Public Service Commission.

It would therefore appear that there is a condition precedent to the existence of the power of eminent domain in the PTC, i. e., that in order for such power to exist in the respondent-company it must become a carrier of express matter and light freight; further, whether or not the con-

dition precedent is to be met rests solely in the discretion of the respondent.

Third, private as compared with public right of way. Mr. Stier's deposition shows the following figures in this regard:

	December 31, 1947	December 31, 1950
Miles of track[1]	556.712	523.279
Private right of way[2]	14.695	14.526
Trackless trolley[3]	26.340	47.607
Buses[3]	601.890	651.390

Of the total route system miles of the PTC, the private rights of way comprised only 1.24% and 1.18% in 1947 and 1950 respectively.

Fourth, PTC admits, and it is patent, that it is a common carrier of *passengers* over a transportation system which serves the Philadelphia area by means of trolleys, elevated and subway cars, buses and trackless trolleys. It is also submitted that this Court can take judicial notice of the fact that practically the whole PTC system is operated as a public convenience over and under the streets of the City of Philadelphia.

While it is true that certain PTC routes extend for short distances beyond the limits of the City of Philadelphia and the PTC does operate 26 cars owned by the Delaware River Bridge Joint Commission under an agreement with that body over the bridge and for a distance of about 1.2 miles

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[1] Miles of track in route service excluding carhouses, sidings and carbarns.

[2] All private right of way is double track so that the figures given above represent one half of the total miles of track of private right of way in 1947 and 1950, respectively, which were: 29.391 and 29.053. In certain cases of private right of way, PTC does not have title in fee, but merely a right of way grant which dedicates the use of the land to PTC so long as it maintains passenger service on it.

[3] The route miles of trackless trolleys and buses are computed on a street mileage basis and regardless of the number of routes which operate over the particular street.

from the center line of the bridge to Broadway Station, Camden, New Jersey, respondent submits that (as the Court said in the *Mangum* case, supra) these lines extend into adjacent urban neighborhoods, which for purposes of transportation are practically part of the city and but extentions of the city street car (transportation) systems.

Persuasive expressions and holdings are to be found in other jurisdictions; see

Stark v. Wilson, et al., 114 Kansas 459, 219 Pac. 507 (1923);

Borelli v. International Ry. Co., 240 N. Y. 54, 147 N. E. 356 (1925); certiorari denied 269 U. S. 557 (1925);

Burdick v. International Ry. Co., 264 N. Y. 510, 191 N. E. 539 (1934); certiorari denied 293 U. S. 559 (1934).

CASES CITED BY PETITIONERS.

The major contention of petitioners seems to be that once having demonstrated to their satisfaction that respondent is engaged in interstate commerce by reason of its operation of the Delaware River Bridge line, its entire system thereby becomes an interstate one and it "a common carrier by railroad". Even if it be assumed that the first part of this argument, viz., that respondent is engaged in interstate commerce, is valid, it by no means follows that it is a common carrier by railroad. The mere assertion of this as a fact does not make it one.

United States, et al. v. Capital Transit Company, 338 U. S. 286, 70 S. Ct. 115 (1949), did not decide that the defendant-company was a "common carrier by railroad". The hold-

ing there was that the company was engaged in a stream of interstate commerce and therefore subject to regulation by the I. C. C. under the Motor Carrier Act.

Nor is petitioners' contention advanced by such cases as:

> *Kansas City Western Railway Company v. McAdow*, 240 U. S. 51, 36 S. Ct. 252 (1916); and
> *Spokane & Inland Empire Railroad Company v. United States*, 241 U. S. 344, 36 S. Ct. 668 (1916).

In each of these cases the facts are substantially different from those in the present cases, and involved railroads. As was stated in *Omaha & Council Bluffs St. Rwy. Co. v. I. C. C.*, 230 U. S. 324, 33 S. Ct. 890 (1913), at page 335:

> "a street railroad, in a technical and popular sense, is as different from an ordinary railroad as a street is from a road."

Of course no quarrel can be had with cases cited by petitioners to the effect that a railroad whose lines are short is not prevented from being held a common carrier under FELA. Of this type is *Kach v. Monessen Southwestern Rwy. Co.*, 151 F. 2d 400 (C. A. 3, 1945), in which there was no contention that defendant was not a railroad. Similarly, however, these cases do not compel a holding that the Delaware River Bridge line by reason of its shortness is thereby a railroad rather than an extension of a purely urban street railway system.

THERE IS NO CONFLICT IN DECISIONS.

The present case is not, as asserted at page 11 of Petitioners' Brief, in direct conflict with the holding in *Kelly v. Delaware River Joint Commission, et al.*, 85 F. Supp. 15 (E. D., Pa., 1949). That case arose on motions to dismiss

on the pleadings without any testimony having been taken, and the Court observed by way of dicta that on the pleadings plaintiffs had made out a prima facie case that PTC was covered by the FELA. It may be conceded, arguendo, that the complaints filed herein prima facie averred FELA causes of action. However, in view of the undisputed facts developed on discovery, the prima facie averments have been refuted. It is further suggested that even if there was a holding in the *Kelly* case such as petitioners contend, the same was overruled by the opinion of the Court of Appeals for the Third Circuit in the present case.

Nor is the decision in the present case "in absolute irreconcilable conflict with the Court of Appeals for the Second Circuit in *Clemence v. Hudson and Manhattan Railway Co.*, 11 F. 2d 913", as is asserted on page 11 of Petitioners' Brief. The question decided there was whether the employee was in fact engaged in interstate commerce at the time of his injury. No question was raised or decided as to whether the defendant-company was a "common carrier by railroad". It is pointed out in the opinion that the company's sole line ran from New York to Jersey City, and it follows therefore that it was not engaged in a street railway system operation. Although not a matter of record in the present case, it is a fact that the company there was chartered in New York and New Jersey as a railroad, as the result of the merger of several railroad companies. To assert, therefore, that this case is in conflict with the present one is a bald attempt to bring the matter within Rule 38.5(b).

CONCLUSION.

An analysis of the argument of Petitioners would seem to indicate that the Court should look first to the Delaware River Bridge operation and then consider the entire system as being integrated with that line, rather than look at the entire system with its appendage infinitesimal by compari-

son with the main operation of an urban street railway system.

The decision of the Court below is clearly correct. There is no conflict of decisions. For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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